

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 22, 2009

**STATE OF TENNESSEE v. DAVID BECK**

**Appeal from the Circuit Court for Van Buren County**  
**No. 1892-F     Larry B. Stanley, Judge**

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**No. M2008-00467-CCA-R3-CD - Filed May 11, 2009**

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The Defendant, David Beck, was originally charged with forty-three counts of identity theft. On February 15, 2005, he pleaded guilty to the first two counts in exchange for dismissal of the remaining forty-one counts and received concurrent three-year sentences. He was granted judicial diversion. After he failed to comply with the terms of judicial diversion, judgments of conviction were entered. He was sentenced to serve 120 days of his sentence in confinement with the remainder to be served on probation. He was granted early release after forty-five days. Subsequently, a probation violation warrant was filed. At the resulting probation violation hearing, the Van Buren County Circuit Court revoked the Defendant's probation and ordered the sentences served in the Department of Correction. In this appeal, he contends that the court abused its discretion in doing so. After our review, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

L. Thomas Austin, Dunlap, Tennessee, for the appellant, David Beck.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Mark Tribble, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

We have gleaned the underlying facts from testimony presented at the Defendant's January 28, 2008 probation violation hearing. The State presented two witnesses. The first, Earl Bloodworth, served as the Defendant's probation officer. He testified that the Defendant, after

violating the conditions of the judicial diversion originally granted to him after he pleaded guilty to two counts of identity theft, was sentenced to serve 120 days of his three-year effective sentence. He was granted early release after forty-five days and began serving the rest of his sentence on probation. One condition of the Defendant's probation required him to submit to drug tests by providing urine samples.

After the Defendant's release, Bloodworth experienced some problems getting adequate urine samples from the Defendant at the scheduled testing times. As a result, Bloodworth decided that he would begin retrieving samples from the Defendant at unscheduled times. At some time before November 15, 2007, Bloodworth went to the Defendant's house in the early evening to procure a sample. Bloodworth talked to the Defendant and waited forty-five minutes, but the Defendant did not produce a sample. The Defendant's wife then informed the Defendant that one of their daughters had been in a car accident. Bloodworth then told the Defendant that he would return to get a sample some other time.

Bloodworth made another unscheduled visit at about 5:15 p.m. on November 15, 2007. On that occasion, the Defendant claimed he could not produce a sample because it was embarrassing, because he was surprised, and because he was upset by certain marital difficulties he had been experiencing. Bloodworth told the Defendant he would wait two hours for the sample; the Defendant responded that he was not going to produce one. Bloodworth informed the Defendant that his refusal constituted an automatic probation violation, and he left. Bloodworth confirmed that the Defendant had always reported for scheduled tests and meetings and had continued to report monthly since the day of the violation.

The State also presented the testimony of Marty McGinness, a Special Agent with the Tennessee Bureau of Investigation ("TBI"). Agent McGinness testified that the Defendant had been granted early release from jail following his violation of judicial diversion in exchange for his promise to assist the TBI in drug investigations. Agent McGinness approached the Defendant about the investigation of a certain suspected drug dealer; the Defendant refused to help, however, claiming that his brother had stolen from that suspect and that he was consequently afraid. The Defendant said he would help investigate other suspects in the future, however.

The Defendant's father, Billy Beck, testified for the Defendant. He said that he spoke to the Defendant on November 15, 2007, soon after the Defendant had refused to give Bloodworth a urine sample. He and the Defendant agreed the refusal was a mistake. Beck and the Defendant therefore went to Bloodworth's office at 6:45 a.m. the next morning, apologized, and offered to give a sample. Bloodworth refused to take it and reiterated that the Defendant had committed a violation the previous evening.

The Defendant also testified. He said that he was employed by Wright Construction and worked in the Chattanooga area. He financially supported his wife, two daughters, and one step-daughter. He corroborated his father's testimony but added that he had attempted to find Bloodworth's phone number or address after realizing his mistake on the evening of November 15,

2007. He said that he would have provided a sample that evening had he been able to locate Bloodworth.

The trial court explained its ruling:

[Defendant], I kind of feel sorry for you. I know you go to work and you support a lot of people but to me that makes it just the more obvious that you do whatever you can to stay out of jail.

You committed two crimes. Your father says you're not a criminal but at one point you did commit two crimes. You were convicted of identity theft twice. You didn't have to go to jail for that. You got judicial diversion. All you had to do was stay out of trouble and follow the rules. You chose not to do that for whatever reason. So your judicial diversion was terminated and you were scheduled to go to jail, still catching somewhat of a break on a three year sentence you only had to serve 120 days. Well, you caught a break from that when you agreed with TBI or investigators or whoever it was to help them. They agreed to stand up for you and get you out of jail early so that you could help them. Well, you chose not to or couldn't do that for whatever reason. Then Mr. Bloodworth asked you for two drug tests . . . . Can't give one for 45 minutes the first time. He comes back again, another unannounced time and your answer is that I was mad and he caught me by surprise. That's exactly what he's supposed to do. You can't take these things at your choice.

You've been given about four breaks here and for whatever reason, that's the dumbest thing I've ever heard. You've got all these people counting on you, you work, you have to work hard to make the payments and this kind of thing. You're looking at three years in prison and you've already messed up twice and you just choose not to give him a drug test because you were upset.

The trial court ruled that the Defendant had violated his probation and ordered him to serve the remainder of his sentence in the Department of Correction. The Defendant now appeals.

### **Analysis**

A trial judge is vested with the discretionary authority to revoke probation if a preponderance of the evidence establishes that a defendant violated the conditions of his or her probation. See Tenn. Code Ann. §§ 40-35-310, -311(e); State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). “The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment.” State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

When a probation revocation is challenged, this Court has a limited scope of review. We will not overturn a trial court's order revoking probation absent an abuse of discretion. See Shaffer, 45

S.W.3d at 554. For an appellate court to be warranted in finding that a trial judge abused his or her discretion by revoking probation, “there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred.” Id.

We conclude that substantial evidence supported the trial court’s decision in this case. The record contains a copy of the Defendant’s probation order, which includes the condition that he submit to random drug testing. Regardless of the Defendant’s later attempts to rectify the situation, Earl Bloodworth testified that the Defendant violated this condition.

The Defendant further argues that the trial court, upon finding that he violated his probation, should not have ordered him to serve the full remainder of his three-year sentence. While we acknowledge that a trial court is empowered to order less severe sanctions, see Tennessee Code Annotated sections 40-35-308, -310, -311, the Defendant has not demonstrated that the trial court abused its discretion by declining to do so in this case. In our view, the trial court clearly explained its reasoning that the Defendant had already received a number of “breaks” and did not deserve another. This issue is without merit.

### **Conclusion**

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE